



IT IS ORDERED as set forth below:

Date: April 06, 2010

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	CASE NUMBERS
	:	
ORALYNETTA ANDREA JORDAN,	:	BANKRUPTCY CASE
	:	NO. 09-86613-MGD
Debtor,	:	
	:	
ORALYNETTA ANDREA JORDAN,	:	ADVERSARY CASE
	:	NO. 09-6600
Plaintiff,	:	
	:	
v.	:	CHAPTER 7
	:	
HSBC BANK USA, N.A. d/b/a/	:	
HSBC BANK OF NEVADA, N.A.,	:	
	:	
Defendant.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This case is before the Court on the Plaintiff's Motion for Default Judgment ("Motion"). (Docket No. 5). Plaintiff commenced the underlying adversary proceeding against Defendant on October 21, 2009, seeking to avoid and recover garnished funds in the amount of \$1,468.00 under

11 U.S.C. §§ 522(h), 542, 543 and 547. Defendant did not file an answer to Plaintiff's Complaint, and an entry of default was made. Because the Defendant was not properly served with process, Plaintiff's Motion is denied.

Plaintiff filed a Complaint in the above-styled action on October 21, 2009. A summons was issued on October 21, 2009 directing Defendant to submit a motion or answer the complaint within thirty days from the date of issuance of the summons. (Docket No. 2). The certificate of service, also filed on October 21, 2009, does not reflect proper service of process on Defendant¹, an insured depository institution, as required by Rule 7004(h) of the Federal Rules of Bankruptcy Procedure. Rule 7004(h) requires that service on an insured depository institution be made by certified mail addressed to an officer unless an exception enumerated in subsections (1) through (3) applies. FED. R. BANKR. P. 7004(h). Plaintiff's certificate of service indicates that Paul Lawrence, noted as Chief Executive Officer for Defendant, and Dennis E. Henry, noted as attorney for Defendant, were served by regular, first class mail. Rule 7004(h)(1) allows service on an institution's attorney by first class mail when the institution has appeared by its attorney. FED. R. BANKR. P. 7004(h)(1). There is no indication that Mr. Henry has appeared in this adversary proceeding on behalf of Defendant or that he appeared in Plaintiff's underlying Chapter 7 case in any capacity.

Plaintiff later filed an amended complaint on December 12, 2007. (Docket No. 4). The certificate of service accompanying the amended complaint certifies "that the service of the foregoing summons and a copy of the Amended Complaint for Turnover [was] made [on] Monday, December 07, 2009" by certified mail on Paul Lawrence, as Chief Executive Officer for Defendant.

¹ Plaintiff's complaint and amended complaint state that Defendant is an FDIC-insured corporation. (Complaint ¶ 8; Amended Complaint ¶¶ 5 & 10).

Although service of the amended complaint by certified mail cures the service problem with respect to the amended complaint, Plaintiff still fails to comply with Rule 7004(e), which provides the time limit for service of the summons. Rule 7004(3) states, in pertinent part:

If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served.

FED. R. BANKR. P. 7004(e).² Defendant was never properly served with a valid summons; and, therefore, this Court does not have jurisdiction over Defendant. *See, e.g., HBH Enters. v. Freeman (In re Freeman)*, 2009 Bankr. LEXIS 4252 (Bankr. N.D. Ga. Nov. 18, 2009). Service on October 21, 2009 was improper because the summons and original complaint were not served by certified mail, as required for a insured depository institution under Rule 7004(h). Likewise, service of the amended complaint with an expired summons is not sufficient to subject Defendant to the jurisdiction of this Court. Bankruptcy Rule 7004(e) provides that when a summons is not timely delivered an alias summons must be obtained. FED. R. BANKR. P. 7004(e); *Sheehan v. Gay (In re Gay)*, 415 B.R. 872, 873 (Bankr. M.D. Fla. 2009). Based on the service defect and lack of jurisdiction, Plaintiff is not entitled to a default judgment.

Rule 4(c)(1) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7004 of the Federal Rules of Bankruptcy Procedure, provides that the plaintiff is responsible for serving the summons and complaint within the time allowed by Rule 4(m). FED. R. CIV. P. 4(c)(1). Rule 4(m) allows for service within 120 days after the complaint is filed. FED. R. CIV. P. 4(m). Rule 4(m) instructs the Court to dismiss the action without prejudice when a defendant is not

² Effective December 1, 2009, Bankruptcy Rule 7004(e) provides for 14 days to mail the summons and the complaint.

served within the 120-day period or order that service is made within a specified time. *Id.* The Court will allow Plaintiff an additional fourteen days to properly serve a copy of the amended complaint and an alias summons pursuant to Bankruptcy Rule 7004(h). Accordingly, it is

ORDERED that the Plaintiff's Motion for Default Judgment is hereby **DENIED**.

It is **FURTHER ORDERED** that Plaintiff shall have fourteen (14) days from entry of this Order to obtain an alias summons on Defendant and properly serve Defendant with a valid summons and complaint to avoid dismissal of this action without further notice.

The Clerk is directed to serve a copy of this Order upon Plaintiff and Plaintiff's counsel.

END OF DOCUMENT